No. 272.

Brief of Laughlin for Appellee

IN THE SUPREME COURT

Filed Mar. 25, 1899.

UNITED STATES,

October Term, 1898.

THE RATON WATER WORKS COMPANY,
Appellant,

AGAINST

THE TOWN OF RATON,
Appellees.

Appeal from the Supreme Court of the Territory of New Mexico.

BRIEF AND ARGUMENT OF APPELLEE.

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NEW MEXICAN PRINTING CO., SANTA FE, N. M.

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BRIEF AND ARGUMENT FOR APPELLEE.

The appellee contends that the decision of the New Mexico supreme court should be affirmed, on two general propositions:

First. Because the contract, Ordinance No. 10, is *ultra vires*, and void in so far as it attempts to bind the appellee town to pay more than the proceeds derived from a two-mills levy on all the taxable property within its corporate limits, each year.

Second. Because there is not any equity in the complainant's bill, in this, that the purposes of the cause of action and the prayer of the bill, is for specific performance. and on the allegations, as therein averred, the court has no jurisdiction to enforce the relief sought.

NEW MEXICO STATUTES.

Such statutes as seem to be material to a proper determination of this cause will be quoted in full under each proposition, with reference to the Compiled Laws of New Mexico of 1884.

GENERAL INCORPORATION LAW.

Section 1620. Cities and towns organized as provided in this chapter shall be bodies politic and corporate, under such name and style as they may select at the time of their organization, and may sue, or be sued, contract, or be contracted with, acquire and hold property, real and personal, have a common seal which they may change and alter at pleasure, and have such other privileges as are incident to corporations of like character or degree, not inconsistent with the laws of the territory.

Section 1621. All municipal corporations organized under this act shall have the general powers and privileges, and be subjected to the rules and restrictions granted and provided in the sections of this act.

POWERS.

Section 1622. The city council and board of trustees in towns shall have the following powers:

First. To control the finances and property of the corporation.

Second. To appropriate money for corporate purposes only, and provide for payment of debts and expenses of the corporation.

Third. To levy and collect taxes for general and special purposes on real and personal property.

Sixth. To contract an indebtedness on behalf of the city, and upon the credit thereof, by borrowing money or issuing the bonds of the city or town for the following purposes, to wit: For the purpose of erecting public buildings; for the purpose of constructing sewers for the city or town; for the purpose of the purchase or construction of water works for fire and domestic purposes; for the purpose of the construction or purchase of a canal or canals or some suitable system for supplying water for irrigation in the city or town; for the purpose of the construction or purchase of gas works for manufacturing illuminating gas, or purchasing illuminating gas, and for the purpose of supplying a temporary deficiency in the revenue for defraying the current expenses of the city or town. The total amount of indebtedness for all purposes shall not at any time ex-

ceed five per centum of the total assessed valuation of the taxable property in the city or town, except such debt as may be incurred in supplying the city or town with water and water works, and no loan for any purpose shall be made except it be by ordinance, which shall be irrepealable until the indebtedness therein provided for shall be fully paid, specifying the purposes to which the funds to be raised shall be applied and providing for the levying of a tax not exceeding *in total amount for the entire indebtedness of the city and town* (excepting such debt as may be incurred in supplying the city or town with water or water works), eight mills upon each dollar valuation of the taxable property within the city or town, sufficient to pay the annual interest and extinguish the principal for such debt within the time limited for the debt to run, which shall not be less than ten years nor more than thirty years: *And providing*, That said tax, when collected, shall only be applied to the purpose in said ordinances specified until the indebtedness shall be paid and discharged, but no such debt shall be created except for supplying the city or town with water, unless the question of incurring the same shall, at a regular election of officers for the city, be submitted to a vote of such qualified electors of the city or town as shall in the next preceding year have paid a property tax therein, and a majority of those voting upon the question, by ballot deposited in a separate ballot box, shall vote in favor of creating such debt. * * *

Sixty-seventh. They shall have power to erect water works, or gas works, or authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town, voting on the question at a general or special election, by vote approve the same.

Sixty-ninth. When the right to build and operate such water and gas works is granted to private individuals or incorporated companies by said cities and towns, they may make such grants to inure for a term of not more than twenty-five years, and authorize such individuals or companies to charge and collect from each person supplied by them with water or gas, such water or gas rent as may be agreed upon between said persons or corporations so building said works and said city or town, and such cities or towns are authorized and empowered to enter into a contract with the individual or company constructing said works, to supply said city or town with water for fire purposes thereof, and for such other purposes as may be necessary for the health and safety thereof, and also with gas,

and to pay therefor such sum or sums as may be agreed upon between said contracting parties.

Section 1646. All warrants drawn upon the treasurer must be signed by the mayor, and countersigned by the clerk, stating the particular fund or appropriation to which the same is chargeable and the person to whom payable, and no money shall be drawn except as hereinafter provided.

Section 1647. All moneys received on any special assessment shall be held by the treasurer as a special fund to be applied to the payment of the improvement for which the assessment was made, and said money shall be used for no other purpose whatever unless to reimburse such corporation for money expended for such improvements.

Section 1649. Every treasurer of any incorporated city or town of this territory shall have and keep in his office a book to be called the registry of city or town orders, wherein shall be entered and set down at the date of the presentation thereof, and without any interval or blank line between any such entry and the one preceding it, every city or town order, warrant or other certificate of such town or city indebtedness, at any time presented to such town or city treasurer for payment, whether the same be paid at the time of presentation or not, the number and date of such order or certificate, the amount, the date of presentation, and the name of the person presenting the same, and the particular fund, if any, upon which the order is drawn. Every such registry of city or town orders shall be open at all seasonable hours to the inspection of any person desiring to inspect or examine the same.

Section 1650. Every fund in the hands of any treasurer of any such city or town of this territory for disbursement shall be paid out in the order in which the orders drawn thereon, and payable out of the same, shall be presented for payment.

Section 1652. Any city or town treasurer, or his deputy, who shall fail or neglect to keep such registry, or who may fail or neglect to register any warrant or certificate of indebtedness of such town or city as shall be entitled to registry, or shall neglect or refuse to pay such warrants or certificates in the said order of payments, there being then money in the treasury applicable to the payment thereof, or wherefrom the same ought to be paid, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in a sum not less than one hundred, nor more than five hundred dollars.

TAXATION.

Section 1656. The city council or board of trustees of any city or town shall have power and authority to levy taxes, the same kinds and classes upon taxable property, real, personal, and mixed, within the limits of the city or town, as are subject to taxation for territory or county purposes, in accordance with the laws of this territory.

CITIES AND TOWNS, HOW GRADED.

Section 1669. In respect to the exercise of certain corporate powers, and the duties of certain officers, municipal corporations are divided into cities and incorporated towns.

Section 1670. Every municipal corporation having a population of three thousand and upwards shall be a city, and every municipal corporation having a population of fifteen hundred shall be deemed an incorporated town.

LIMIT OF TAXATION.

Section 1724. No more than one per centum *ad valorem* shall ever be levied or collected by any corporation, organized under this act, upon the assessed value of the taxable property situate within the limits of such corporation for all purposes, and no indebtedness shall be incurred which will require any greater annual expenditure than said one per centum per annum will fully pay off and satisfy.

The cause was set down and heard on bill and answer; the bill was verified, but it expressly waived answer under oath, (trans. p. 7) in accordance with equity rule 34 promulgated by the New Mexico supreme court prescribing practice and procedure in the district courts, under the statute of the territory, to wit:

C. L. 1884, sec 521. "It is hereby made the duty of the said supreme court to ordain and establish, both for itself and the district courts, in all matters pertaining to their respective jurisdictions, all necessary rules and forms of proceeding and practice, not inconsistent with the laws of this territory."

Said rule 34 is as follows, to wit:

"If the plaintiff waives the necessity of the answer being made on the oath of the defendant, it must be distinctly stated in the bill; when the answer is put in without oath, it may be excepted to for scandal or impertinence, but not for insufficiency; and all material allegations in the bill which are not answered and admitted may be proved

by the plaintiff in the same manner as if they were distinctly put in issue by the answer, and if no replication is filed the matters of defense set up in the defendant's answer will, on the hearing, be considered as admitted by the plaintiff, although the answer is not on oath." See rules of the supreme court, in force January 1st, 1894, page 33, rule 34.

Then the material allegations in the answer, well pleaded, where no replication is filed are admitted by the plaintiff.

1 *Daniel Ch. P. & P.*, sec. 846 (5th edition).

Par. 67, section 1622 provides that:

"They shall have power to erect water works, or gas works, or authorize the erection of the same by others; but no such works shall be erected or authorized until a majority of the voters of the city or town, voting on the question at a general or special election, by vote, approve the same."

This statute is for the purpose of obtaining the will and consent of the people of the town as to whether or not they are willing to incur the expense of the special levy for taxes, as provided by statute. It gave no additional force or validity to the terms of the contract, except as to whether or not the works shall be erected, and was not a condition precedent to the validity of the ordinance.

Thompson Houston Electric Co. vs. City of Newton, 42 Fed. Rep. 723.

I.

Now, returning to the first general proposition, did the trustees of the appellee town have the power to enter into the contract made under Ordinance No. 10, so as to bind the town to levy, collect and pay, for water rents for the purposes stated in the bill of complaint, any sum in excess of the proceeds derived from a special levy of two mills on each dollar of the assessed valuation of all the property subject to taxation within the corporate limits of the town, for each year.

Our contention is that they had not any such power, and that the contract is *ultra vires* so far as the contract seeks to bind the town to pay more than the proceeds arising from the special tax of two mills, and in that it seeks to compel the town to pay any deficits out of the general revenues of the town derived from all sources whatever.

The town corporation is a creature of the statute under which it was created and organized, and it has no powers other than those given it by the statutes, and which may be conferred on it by a fair construction by the courts in accordance with the statutes.

Paragraph 71 of section 1622 provides that:

"Seventy-first. All cities and incorporated towns constructing such water or gas works are authorized to assess, from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water or gas, such water or gas rents as may be agreed upon by the council or trustees, or upon each vacant lot in front of which the pipes commonly called street mains, are laid, but such vacant lots as do not take water from such street mains shall not be assessed more than one-half as much as may be assessed against the same amount of frontage of lots occupied by a one story building; and gas should be charged for by the foot, and then only to such as use it, and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rent hereby authorized, shall be sufficient to pay the expenses of running, repairing, and operating such works; and if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected, a special tax as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works: *Provided, however*, That said last mentioned tax shall not exceed the sum of two mills on the dollar for any one year."

It will be observed from this paragraph that if the town

constructs its own water works, in order to pay for the same it is provided:

"And at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rents hereby authorized, shall be sufficient to pay the expenses of running, repairing and operating such works; and if the right to build, maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected, a special tax as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company, or company constructing said works."

Now, this much of paragraph seventy-one, must be read with paragraph sixty-seven, because paragraph sixty-nine gives the authority to grant the right to an individual or company to construct such works, and paragraph seventy-one provides that the water rents shall be paid for from the income from the consumers of the water and a special tax, and if no further provisions were made the contention of the appellant might be correct, and if the special tax collected, with incomes from the consumers, were insufficient to pay off the water rents contracted for, then resort might be had to the general funds, or to an additional levy; but this contention is repelled by the proviso to paragraph seventy-one, as follows, to wit:

"*Provided, however,* That said last mentioned tax shall not exceed the sum of two mills on the dollar for any one year."

This proviso is a clear inhibition on the town trustees from contracting to pay any more than the proceeds of the two mill levy.

It would not be contended that if the town had constructed the water works it could have levied and collected to pay the expenses of running, repairing and operating such works, anything but the special tax provided for, it could

not have drawn on the general fund for deficiencies; and it is not fair to presume that the legislature intended to grant any other or more liberal terms to an individual or incorporated company than it intended to grant the inhabitants of the town; because paragraph seventy-one says when the right to construct such works shall be granted to individuals or company there shall be levied and collected each year, "a special tax as provided for above, sufficient to pay off such water or gas rent so agreed to be paid to said individual or company," etc. The legislature was careful to specially use the words a special tax "sufficient to pay off such water or gas *rents* so agreed to be paid to said individuals or company," showing that the "water *rents*" were the particular objects the legislature had in mind.

It will be observed from paragraph six, section 1622, that the limit of taxation for all purposes "in total amount for the entire indebtedness of the city or town (excepting such debts as may be incurred in supplying the city or town with water or water works), is eight mills upon each dollar valuation of the taxable property within the city or town." * * * This, with the two mills special tax provided for in paragraph seventy-one to pay for water rents, runs up to the full limit of taxation for all purposes.

The exception in this paragraph applies to the construction and ownership of water works by the town, or to the supplying of the same with water, and gives the town the option of so doing by creating an indebtedness, or to contract for water, as it did, and leaves a margin between the eight mills and the highest limit, to enable the town to pay water rents, the cost of construction to be paid for by bonds or otherwise.

Section 1724 provides that:

"No more than one per centum *ad valorem* shall ever be levied or collected by any corporation, organized under this act, upon the assessed value of the taxable property situate within the limits of such corporation for all purposes, and no indebtedness shall be incurred which will require any greater annual expenditure than said one per centum will fully pay off and satisfy."

This statute fixes a limit of indebtedness beyond which the town trustees could not go; they had no original authority to contract any indebtedness for any purpose which would require more than the proceeds derived from a levy of one per centum on the valuation of all taxable property within their corporate limits. And when the word "indebtedness" is used here, an indebtedness for current annual expenses is meant, and not a bonded indebtedness as applied to corporate securities, and that class of corporate indebtedness.

It is certified (trans. p. 66) that the total taxes collected for 1894, on a ten mill levy, the full limit allowed by law, on all the taxable property in the town, was $3,616.52; and this was the largest sum collected during any one year from the granting of the franchise to appellant to the bringing of this suit, which sum was insufficient to pay the water rents for that year. It also appears from the answer (trans. p. 16) and it is so certified (trans. p. 65) that practically the entire revenue for all corporate purposes of the town is derived from its tax levy on the taxable property. It thus appears that there never was in any one year during the existence of this contract, ordinance No. 10, sufficient revenue collected by the town to pay the full amount of the water rents agreed to be paid, thus leaving the town without any money to pay any other of its courrent expenses, and a deficit besides. The legislature never could have intended this.

It appears in the answer (trans. p. 66).

"That under the law the defendant, The Town of Raton, paid complainant each year the full proceeds of two mills tax levy authorized by law for water rent; that in 1892 it paid complainant the sum of nineteen hundred and twenty-five dollars; in 1893 the sum of eighteen hundred dollars; in 1894 the sum of sixteen hundred dollars, and for 1895 it has under ordinance "No. F," hereinbefore referred to, levied said special tax of two mills on each dollar of taxable property to meet complainant's water rent; that under the law the total amount appropriated for any purpose for any fiscal year cannot exceed the probable amount of revenue for that year, and that its appropriation of fifteen hundred

dollars in said ordinance "No. F" for complainant's benefit for the year 1895 is a full compliance for the complainant's legal demand under said contract marked complainant's exhibit "A," as likewise amounts paid for in 1892, 1893 and 1894 are in full of all that complainant can in equity and good conscience demand under its contract with the defendant. Defendant, further answering, shows that said alleged semi-annual rental of one thousand nine hundred and sixty-two dollars and fifty cents claimed by complainant is far in excess of the amount derivable from a two-mills tax levy on the assessed value of property subject to taxation within said Town of Raton, and that said rental, so far as it is in excess of the proceeds of said tax levy, is illegal, inoperative and void."

It has been seen, by paragraphs six and seventy-one, section 1622, and by section 1724, that the full limit which the appellee's trustees were authorized to levy and collect in any one year is ten mills on each dollar on all the taxable property within its corporate limits; and by section 1636, the limitation is:

"Nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year."

Hence, there is a limitation as to the total levy for all purposes; a limitation as to the special levy for water rents, and a limitation as to the appropriations which shall not exceed the probable amount of revenue to be derived from such levies.

By section 1638, it is provided that:

"No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof, and no expense shall be incurred by any of the officials or departments of the corporation, whether the object of expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made, except as herein otherwise expressly provided."

We have before seen that the appropriations for general purposes are limited to eight mills on the dollar, and for water rents to two mills on the dollar (paragraphs six and seventy-one, sec. 1622), making the full limit of ten mills for all purposes. This is all the board of trustees could

levy under this act for any and all purposes, for annual current expenses; and they were expressly prohibited from entering into any contract which would require any greater appropriation for any purpose, by section 1638.

It is certified by the court below, and it is not denied that practically all the revenues of the town are derived from taxes; and that the proceeds derived from the total levy of ten mills is insufficient to pay the water rents contracted to be paid by the appellees's trustees; and they are powerless to comply with the terms of payment in their alleged contract (ordinance No. 10), even if they should disregard and decline to pay any other of the town's legal obligations in the way of current annual expenses, as shown by the record in this cause.

These statutes were public notice to both the trustees of appellee, and to the representatives of the appellant, when the contract was entered into, and both parties are bound by the statutes of the territory in force at the time, and under which they acted.

"Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued."

United States vs. Macon County, 99 U. S., 582.
Coler vs. City of Cleburne, 131 U. S., 162.
Buchannan vs. Litchfield, 102 U. S., 728.
Lake County vs. Graham, 130 U. S., 674.

AUTHORITIES.

It is insisted that the following authorities sustain the construction of the foregoing statutes contended for by appellee.

This court held in *United States vs. Macon County,* 99 U. S., 582:

"Thus, while the debt was authorized, the power of taxation for its payment was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued. The general power of taxation to pay county

debts is as ample now as it was when the railroad company was incorporated and the debt was incurred. The difficulty lies in the want of original power. While there has, undoubtedly, been great recklessness on the part of the municipal authorities in the creation of bonded indebtedness, there has not unfrequently been gross carelessness on the part of purchaser when investing in such securities. Every purchaser of a municipal bond is chargeable with notice of the statute under which the bond was issued. If the statute gives no power to make the bond, the municipality is not bound. So, too, if the municipality has no power, either by express grant or by implication, to raise money by taxation to pay the bond, the holder cannot require the municipal authorities to levy a tax for that purpose. If the purshaser in this case had examined the statutes under which the county was acting, he would have seen what might prove to be difficulties in the way of payment. As it is, he holds the obligation of a debtor who is unable to provide the means of payment. We have no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is to bring existing powers into operation. In this case it appears that the special tax of one-twentieth of one per cent. has been regularly levied, collected, and applied, and no complaint is made as to the levy of the one-half of one per cent. for general purposes. What is wanted is the levy beyond these amounts, and that, we think, under existing laws, we have no power to order."

In *Buchannan vs. City of Litchfield*, 102 U. S., 272, in passing on a constitutional limitation prohibiting an indebtedness of more than five per centum on the assessed valuation of the taxable property within the corporate limits of the city, this court said:

"The first and most important of the certified questions involves the construction of the foregoing section and article of the state constitution.

"The words employed are too explicit to leave any doubt as to the object of the constitutional restriction upon municipal indebtedness. The purpose of its framers, beyond all question, was to withhold from the legislative department the power to confer upon municipal corporations authority to incur indebtedness in excess of a prescribed amount. The authority, therefore, conferred by the act of April 15th, 1873, to incur indebtedness in the construction and maintenance of a system of water works, could have been law-

fully exercised by a city, incorporated town or village, only when its liabilities, increased by any proposed new indebtedness, would be within the constitutional limit. No legislation could confer upon a municipal corporation authority to contract indebtedness which the constitution expressly declared it should not be allowed to incur. *Law vs. People,* 87 Ill., 385; *Fuller vs. Chicago,* 89 Ill., 282.

"If, therefore it appears by evidence of which the city may rightfully avail itself, as against a *bona fide* holder for value of the coupons in suit, that the bonds, issued January 1, 1874, created an indebtedness in excess of the amount to which municipal indebtedness is restricted by the constitution, there would seem to be no escape from the conclusion that the bonds are void for the want of legal authority to issue them at the time they were issued."

It is true that in this case the question involved was as to an excess of a bonded indebtedness over a constitutional limitation, yet the principle is the same, that is, the power in the municipal officers to enter into a contract in contravention of a constitutional limitation, in the case at bar in contravention of a statutory limitation, and as the territory has no organic law, except the acts of congress, the same force and effect should be given its statutes when not in conflict with the constitution or laws of the United States, as are given to the constitutions and statutes of states. In that case (*Buchannan vs. Litchfield, supra*) the plaintiff in error was a *bona fide* holder of the bonds for which he had paid his money; in the case at bar, so far as the record shows, the warrants outstanding are in the hands of the original parties, and all the interests involved in this action are for the benefit of the original parties to the contract, and the principle of innocent holders for value, can not apply.

Again, in passing on these Litchfield city bonds, in *City of Litchfield vs. Ballou,* 114 U. S., 190, in commenting on the constitutional limitation, this court said:

"The language of the constitution is that no city, etc., 'shall be allowed to become *indebted in any manner or for any purpose* to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of its taxable property.' It shall not *become indebted.* Shall

not incur any pecuniary liability. It shall not do this in *any manner;* neither by bonds, nor notes, nor by express or implied promises. Nor shall it be done for any *purpose;* no matter how urgent, how useful, how unanimous the wish. There stands the existing indebtedness to a given amount in relation to the sources of payment as an impassable obstacle to the creation of any further debt, in any manner, or for any purpose whatever. If this prohibition is worth anything it is as effectual against the implied as express promise, and is as binding in a court of chancery as a court of law."

And again, this court said, in *Nashville vs. Ray,* 86 U. S., 468:

"A municipal corporation is a subordinate branch of the domestic government of a state. It is instituted for public purposes only; and has none of the peculiar qualities and characteristics of a trading corporation, instituted for purposes of private gain, except that of acting in a corporate capacity. Its objects, its responsibilities, and its powers are different. As a local governmental institution, it exists for the benefit of the people within its corporate limits. The legislature invests it with such powers as it deems adequate to the ends to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. As this is a power which immediately affects the entire constituency of the municipal body which exercises it, no evil consequences are likely to ensue from its being conferred; although it is not unusual to affix limits to its exercise for any single year. The power to borrow money is different. When this is exercised the citizens are immediately affected only by the benefit arising from the loan; its burden is not felt till afterwards. Such a power does not belong to a municipal corporation as an incident of its creation. To be possessed it must be conferred by legislation, either express or implied. It does not belong, as a mere matter of course, to local governments to raise loans. Such governments are not created for any such purpose. Their powers are prescribed by their charters, and those charters provide the means for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the public creditors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation."

It is contended by appellee, that where there is a plain limitation found in a constitution or a statute, on the power to levy taxes, that the municipality organized under such constitution or statute, the municipal authorities and all persons dealing with them are bound by such limitations; and any contract entered into in violation of such limitation is void to the extent of such excess of power so exercised; and that such municipal corporations possess no power to enter into contracts in excess of powers contained in the grant, expressly or by fair implication.

Dixon County vs. Field, 111 U. S., 83.
Lake County vs. Rollins, 130 U. S., 662.
Laks County vs. Graham, 130 U. S., 674.

The City Council of the City of York, State vs. Babcock, 20 Neb., 522, by a vote, agreed to issue bonds for the construction of water works, and the proposition was submitted to and voted for by the electors of the city under a statute similar to the New Mexico statutes, and the court, in passing on the statute, said:

"Second. The second question is a more serious one. The assessed valuation of the City of York was the sum of $335,000. The vote authorized the issue of and it is now sought to compel the defendant to certify bonds to the amount of thirty thousand dollars, bearing interest at the rate of six per centum per annum. The statute limits the levy 'of tax for water works to an amount not exceeding five mills on the dollar in any one year on all the property within such city or village, as shown and valued upon the assessment rolls.' This is a limitation upon the power of the city council beyond which they have no authority to issue bonds. *Hamlin vs. Meadville,* 6 Neb., 227; *Reineman vs. C., C. & B. H. R. R. Co.,* 7 Neb., 314. This point is not insisted on by the defendant, but the fact is apparent upon the face of the record, and is thus brought to the attention of the court. It is apparent that the issue is in excess of the power of the city council, and that the defendant was justified in refusing to certify the same.

"The writ must therefore be denied."

Law vs. People, 87 Ill., 385.

PAYMENT OUT OF GENERAL FUNDS.

The appellee does not deny the force of the *proviso* in paragraph seventy-one, but insists that any deficiency in the amount due for water rents should be paid out of the general funds derived from all sources. This, appellee contends, canot be done, because the statutes governing the appellee corporation forbid it.

STATUTES.

(Ordinances.)

"Section 1623. Municipal corporations shall have power to make and publish, from time to time, ordinances not inconsistent with the laws of the territory, for carrying into effect or discharging the powers and duties conferred by this act, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof, and to enforce obedience to such ordinances by fines not exceeding three hundred dollars, or by imprisonment not exceeding ninety days, by suit or prosecution before any justice of the peace within the limits of such city or town."

APPROPRIATIONS AND EXPENDITURES.

"Section 1636. The fiscal year of each city or town organized under this act shall commence on the first day of April in each year, or at such other time as may be fixed by ordinance. The city council of cities and board of trustees in towns shall, within the last quarter of each fiscal year, pass an ordinance to be termed the annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sum of money as may be deemed necessary to defray all expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made and the amounts appropriated for each object or purpose. No further appropriations shall be made at any other time within such fiscal year, unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city or town. either by a petition signed by them, or at a general or special election duly called therefor. Nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year.

"Section 1637. Neither the city council nor the board of

trustees, nor any department or officer of the corporation, shall add to the corporation expenditures in any one year anything over and above the amount provided for in the annual appropriation bill of that year, except as is herein otherwise specially provided; and no expenditures for an improvement to be paid for out of the general fund of the corporation shall exceed in any one year the amount provided for such improvement in the annual appropriation bill: *Provided, however*, That nothing herein contained shall prevent the city council or board of trustees from ordering by a two-thirds vote, any improvement, the necessity of which is caused by any casualty or accident, happening after such annual appropriation is made.

"Section 1638. No contract shall be hereafter made by the city council or board of trustees, or any committee or member thereof, and no expense shall be incurred by any of the officers or departments of the corporation, whether the object of expenditure shall have been ordered by the city council or board of trustees or not, unless an appropriation shall have been previously made, concerning such expense, except as herein otherwise expressly provided."

TREASURER.

"Section 1640. The treasurer shall receive all moneys belonging to the corporation, and shall keep his books and accounts in such manner as may be prescribed by ordinance; and such books and accounts shall always be subject to the inspection of any member of the city council or board of trustees.

"Section 1641. He shall keep a separate account of each fund or appropriation, and the debts and credits belonging thereto.

"Section 1642. He shall give every person paying money into the treasury a receipt therefor, specifying the date of payment and upon what account, paid, and he shall also file statements of such receipts with the clerk at the date of his monthly reports.

"Section 1643. He shall, at the end of each and every month, and oftener if required, render an account to the city council or board of trustees, or such officer as may be designated by ordinance, showing the state of the treasury at the date of such account and the balance of the money in the treasury. He shall also accompany such accounts with a statement of all moneys received into the treasury, and on what account, during the preceding month, together with all warrants redeemed and paid by him, which said warrants, with any and all vouchers held by him, shall be delivered to the clerk and filed with his said account in the

clerk's office upon every day of such statement. He shall return all warrants paid by him, stamped or marked, Paid. He shall keep a register of all warrants redeemed and paid, which shall describe such warrants and show the date, amount, number, the fund from which paid, and the name of the person to whom, and when paid."

It will be observed by section 1623, *supra,* that it is made a criminal offense to violate an ordinance; and by section 1636, *supra,* it is made the duty of the trustees of appellee to

"Pass an ordinance to be termed the annual appropriation bill for the next fiscal year, in which such corporate authorities may appropriate such sum of money as may be deemed necessary to defray all expenses and liabilities of such corporation, and in such ordinance shall specify the objects and purposes for which such appropriations are made and the amounts appropriated for each object or purpose. * * *"

This provides that appropriations shall be made for specific purposes, named in the ordinance so making them; and the board of trustees are prohibited from making any expenditures for anything over and above the annual appropriations for specific purposes named (Sec. 1637, *supra;* and they are prohibited from contracting or incurring any indebtedness or obligations not provided for by previous appropriations (Sec. 1638, *supra*). The treasurer "shall keep a separate account of each fund or appropriation, and the debts and credits belonging thereto" (Sec. 1641), and all warrants drawn upon the treasurer must state the particular fund or appropriation to which the same is chargeable, and no money shall be drawn, except as provided (Sec. 1646); and all moneys received on special assessments must be held by the treasurer as a special fund and applied only for the special purposes for which the assessment was made (Sec. 1647).

Reading all these statutes together, there is but one conclusion, that is: That the corporate authorities of appellee have no authority in law to pay any deficiency over and above the proceeds of a two-mill special levy, out of the general funds for water rents.

It is observed (Trans. p. 9) that special appropriations were made by the trustees for the purposes named, and the appellee contends that the appropriations for $4,735.15 for outstanding warrants issued for previous deficiencies of water rents, and the appropriation of $3,935.00 in excess over the proceeds of the two-mills levy were beyond the power of the board of trustees, and in this proceeding void to that extent.

AUTHORITIES.

"This prohibition was manifestly intended to limit the power of the general assembly, municipalities and all others, in the creation of indebtedness by these bodies to the amount named, and they cannot, either separately or jointly, transcend that limit. It is the command of the supreme power of the state, and it must be obeyed. * * *

"It is said that to so hold will work great hardship and injustice on the holders of these certificates of indebtedness. The same may be frequently said of any other persons who violate the law, or act contrary to its provisions. The persons loaning this money did it in the face of this constitutional provision, and the prohibition contained in the 62d section of the charter. The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that that body has power to perform the proposed act. Such corporations are created for governmental and not for commericial purposes.

"But should it work hardship to individuals, that by no means warrants the violation of a plain and emphatic provision of the constitution. The liberty of the citizen, and his security in all his rights, in a large degree depend upon a rigid adherence to the provisions of the constitution and the laws, and their faithful performance. If courts, to avoid hardships, may disregard and refuse to enforce their provisions, then the security of the citizen is imperiled. Then the will, it may be the unbridled will, of the judge, would usurp the place of the constitution and the laws, and the violation of one provision is liable to speedily become a precedent for another, perhaps more flagrant, until all constitutional and legal barriers are destroyed, and none are secure in their rights. Nor are we justified in resorting to strained construction or astute interpretation, to avoid the intention of the framers of the constitution, or the statutes adopted under it, even to relieve against individual or local

hardships. If unwise or hard in their operation, the power that adopted can repeal or amend, and remove the inconvenience. The power to do so has been wisely withheld from the courts, their functions only being to enforce the laws as they find them enacted.

"Nor is there any force in the consideration that to enforce these provisions will occasion inconvenience to the city officials in administering its governmental affairs. It is true, they can, as all must know, only exercise the powers conferred by the charter, in the mode prescribed therein, by their ordinances. Neither a city nor any of its officers has any inherent power in governing it, but all of their powers are delegated and limited by the charter and ordinance adopted in pursuance thereof, and to carry such delegated powers into effect; and the question with us and the city authorities is, not what would be the most suitable powers to be conferred, but what have been granted." *Law vs. people,* 87 Ill., 389.

City of Springfield vs. Edwards, 84 Ill., 626.

In commenting on the powers of municipal authorities to levy and collect general and special taxes, the supreme court of Illinois, in *Webster vs. People,* 98 Ill., 343, 349, said:

"When the statute prescribes a mode and purpose of taxation, it must be pursued, and no other mode or purpose can be substituted by officials exercising the power. When a general tax is authorized, and the rate or per cent. is prescribed, the tax cannot be raised by special taxation, nor can the rate be exceeded. So, a grant of power to impose a special tax or a special assessment for local improvements, confers no power to accomplish the purpose by general tax. The power must be strictly pursued, when called into exercise."

Prince vs. City of Quincy, 105 Ill., 138; and
Prince vs. City of Quincy, Id. 215.

A case almost the same as the one at bar is *Read vs. Atlantic City,* 49 N. J. L., 558, 562, in passing on the power of the municipal authorities to enter into a contract to supply the city with water, that court said:

"There has been no expenditure of public money, and none was contemplated. The enterprise, though of public utility, has yet nothing of a public or even quasi-public nature. The company with which the contract was made was

a private corporation, organized and investing its capital for purposes of gain. The contract with the city relates to a supply of water for public purposes, but it differs in no respect from any contract the company might make with a private individual for the supply of water at a specified price. The company expended its money in erecting its water works, in the expectation of reaping a reward through the compensation it should receive for supplying water, under this and similar contracts. But it had no right to rely on this contract if the city had no authority to make it. Whoever deals with a corporation is in general presumed to know the extent of its powers."

Murphy vs. East Portland, 42 Fed. Rep., 308.

It appears (Trans. p. 66) that the total assessment for 1894, of appellee, was $650,620, and that the full limit of ten mills on the dollar produced $3,616.52; and it is further certified (Trans. p. 65) that practically the entire revenue of appellee town is derived from its tax levy. It also appears (Trans. pp. 9 and 10) that the appropriations attempted to be made under ordinance No. 59, for the years 1895 and 1896 amounted to about $14,000.00, and there is nothing to show that taxable property within appellee's corporate limits had increased to any extent over the previous year, 1894.

These attempted appropriations were excessive, and contrary to section 1636, which says:

"Nor shall the total amount appropriated exceed the probable amount of revenue that will be collected during the fiscal year."

Sullivan et als. vs. City of Leadville, 18 Pac. Rep., 736-8.

When the appellant entered into the contract with the appellee, it became the duty of the contracting parties thereto to consided paragraph seventy-one of section 1622, in making the contract, ordinance No. 10, and both paragraph seventy-one and ordinance No. 10 should have constituted the contract; and the contract should have been so entered into in contemplation of a special tax; but as the town agreed to pay a lump sum which amounted in the

aggregate to more than the proceeds of a special two-mills levy, the contract to that extent was and is *ultra vires.*

In construing a similar statute, the supreme court of Montana, in *State vs. City of Great Falls,* 49 Pac. Rep., 15, said:

"This law was in force when ordinance No. 17 was passed, approved and accepted. We are of the opinion that this law became a part of the contract embodied in said ordinance, and that the relator had a right to insist that, in so far as might be necessary to pay what was due it for hydrant rentals in accordance with the rates prescribed in the ordinance contract, a specitl tax, as provided for in that act, should be levied annually; of course, in only such sums as would be needed, and not exceeding the five mill limit. The contract was entered into in contemplation of a special fund being created by the city to meet liabilities incurred thereunder; and the legislature, in said act, contemplated at the time that cities of the territory should pay for water used by them for sewerage and fire purposes from taxes levied and collected for that special purpose."

This case was founded on a city ordinance the same as ordinance No. 59 here sought to be enforced, in which the city council of Great Falls attempted to set aside a specific sum for water rents, and that court held it could not be done, but must levy, collect and pay water rents out of a specific fund, as provided by statute.

Second Nat. Bank vs. Lansing, 25 Mich., 207.
Findley vs. Hull, 13 Wash., 236.
Salem Water Works Co. vs. City of Salem, 5 Oregon, 29.
Niles Water Works Co. vs. Mayor, 59 Mich., 311.
Humphreys vs. Bayonne, 55 N. J. L., 241.

It is contended by appellant that the statutes of New Mexico relating to municipal corporations was taken from the Iowa statutes on the same subject. This is erroneous, our statutes being copied, almost entirely, from the Colorado statutes, as shown, for example, by the compiled laws of that state, 1883, and the legislature of New Mexico (session 1884) even retained under the head "Powers," the

same paragraphs by number, to wit, p. 973, General Statutes State of Colorado:

"Seventy-first. All cities and incorporated towns constructing such water or gas works are authorized to assess, from time to time, in such manner as they shall deem equitable, upon each tenement or other place supplied with water or gas, such water or gas rents as may be agreed upon by the council or trustees, or upon each vacant lot in front of which the pipes commonly called 'street mains' are laid, but such vacant lots as do not take water from such 'street mains' shall not be assessed more than one-half as much as may be assessed against the same amount of frontage of lots occupied by a one-story building; and gas should be charged for by the foot, and then only to such as use it; and at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on taxable property in said city or town, which tax, with the water or gas rents hereby authorized, shall be sufficient to pay the expenses of running, repairing and operating such works; and if the right to build maintain and operate such works is granted to private individuals or incorporated companies by such cities or towns, and said cities or towns shall contract with said individuals or companies for a supply of water or gas for any purpose, such city or town shall levy each year and cause to be collected a special tax as provided for above, sufficient to pay off such water or gas rents so agreed to be paid to said individuals or company constructing said works: *Provided, however,* That said last mentioned tax shall not exceed the sum of three mills on the dollar for any one year."

And appellee contends that the construction by the supreme court of that state on the statutes with respect to limitations on powers to contract and levy for municipal purposes are in harmony with appellee's contention here.

Sullivan vs. City of Leadville, 18 Pac. Rep., 736.
People vs. May, 10 Pac. Rep., 641.
Town of Durango vs. Pennington, 7 Pac. Rep., 14.
Lake County vs. Rollins, 130 U. S., 662.
Lake County vs. Graham, 130 U. S., 674.
Gas Company vs. Leadville, 9 Colo., Ct. App., 400.
Leadville Water Co. vs. Leadville, 22 Colo., 297.

It is contended by appellant that the contract entered

into under ordinance No. 10 is violated by ordinance No. 64; and it is certified (Trans. p. 66) that "ordinance No. 59 referred to by complainant in exhibit 'E' was and is void and inoperative, and that ordinance No. 64, referred to by complainant in exhibit 'F' was and is valid and in full force."

This finding is erroneous. What the territorial supreme court did decide is, to wit:

"The trustees of the defendant town corporation had no authority to enact and enforce ordinance No. 64, passed May 23d, 1895, so as to in any manner change or affect the appropriations then existing for that fiscal year as provided for by ordinance No. 59, enacted in March, 1895, for the fiscal years 1895 and 1896, and it is therefore void to that extent."

Section 1636 is quoted, and the court says:

"Ordinance No. 59 seems to have been passed in accordance with this statute, and should not be permitted to be changed, so far as its appropriations are legal, by ordinance No. 64, which seems to have been passed on May 23d, 1895, after the time provided by statute."

II.

Recurring to the second proposition, that is, that there is not any equity in complainant's bill, because the principal object sought is specific performance, and on the allegations as therein averred. the court has no jurisdiction to enforce the relief prayed for.

The real purpose of this cause is to require appellee to pay to appellant $4,735.00 in outstanding town warrants issued to it as acknowledgments for delinquent water rents alleged to be due to it, and to enforce the further payments as they may become due in the future (Trans. p. 7).

"And that the said defendant may be decreed specifically to perform the said contract and agreement entered into with your orator as aforesaid, and to pay the amounts of said rental of said hydrants, which has heretofore accrued and become payable, and which may hereafter accrue and become payable, in pursuance of the terms of said contract and agreement."

The case of *Carter et al. vs. United Ins. Co.*, 1 Johns. Ch., (N. Y.), 463, was one in which plaintiffs, as assignee, filed their bill to enforce the payment of an insurance policy, alleging a total loss, and on a demurrer for want of equitable jurisdiction, it was sustained on the ground that the action was cognizable at law, and the opinion is as follows, to wit:

"The Chancellor. The demand is properly cognizable at law, and there is no good reason for coming into this court to recover on the contract of insurance. The plaintiffs are entitled to make use of the names of Gibbs and Titus, the original assured, in the suit at law; and the nominal plaintiffs would not be permited to defeat or prejudice the right of action. It may be said here, as was said by the chancellor in the analogous case of *Dhegetoft vs. London Assurance Company*, Mosely, 83, that it this rate, all policies of insurance would be tried in this court. In that case the policy stood in the name of a nominal trustee, but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed in parliament. 3 Bro. P. C., 525. The bill in this case states no special ground for equitable relief, nor is any discovery sought which requires an answer. Bill dismissed, with costs."

And the case of *Phyfe vs. Wardell et al.*, 2 Edwards Ch. (N. Y.), 47, in which plaintiff filed his bill in order to compel payment of purchase money and obtain *specific performance* of a contract, and in commenting on the relief sought to enforce the contract by *specific performance*, the vice-chancellor said:

"The question then is whether this is such an agreement as equity will aid a party in enforcing. There would be no necessity for resorting to this court if the only object of the bill were to recover payment of a sum of $2,650. A court of law could afford an adequate remedy; and as a general rule equity does not interfere to decree a specific performance of contracts, except where the legal remedy is inadequate or defective, and where something remains to be done over and above the mere payment of money."

The case of *Pierce et al. vs. Plumb*, 74 Ill., 326, was one in which plaintiffs attempt to enforce the conditions in a

bond; the bill was for specific performance, and the court said:

"The transactions between the parties, as evidenced by the writings entered into at the time, was a sale of the interest and property of complainants, for which Plumb gave his bond conditioned to pay the debts of complainants to the amount of $60,000."

"The decree in equity would be but to pay the money, and a judgment at law for it would seem to be of equal avail. It may be stated as one of the rules on this subject, that equity will not decree specific performance, unless something more is to be done by it than mere payment of money, or anything which ends in the mere payment, because the law is adequate to this. 2 Pars. on Cont., 523."

It is true other grounds for relief are alleged and sought for in the prayer of the bill, but they are all decided by the court below in favor of appellant, as will appear by reference to that opinion, and as will more fully appear hereafter.

22 Am. and Eng. Ency. of Law, 997, and cases there cited.

2 Story's Eq. Jur., secs. 712-719.

The appellant has a plain, speedy and adequate remedy at law as to all warrants issued and registered in compliance with the statute and ordinances, in an action for money had and received to the use and benefit of plaintiff, if the contract is valid; and by mandamus to compel a levy sufficient to pay any judgment obtained; and with respect to the amounts due or to become due in future, it could compel by mandamus the issuing and registering of warrants, or obtain judgment in the same manner. This question was raised directly by the answer (Trans. p. 17):

"And this defendant submits to this honorable court that all and every matter in the complainant's bill mentioned and complained of, are matters which may be tried and determined at law, and with respect to which the complainant is not entitled to any relief from a court of equity, and this defendant asks that *it* shall have the same benefit of this defense as if *it* had demurred to the complainant's bill."

MANDAMUS.

Section 1993, Compiled Laws of New Mexico of 1884 says:

"It may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station. * * *"

In *City of Litchfield vs. Ballou,* 114 U. S., 190, this court said:

"But the complainant insists that though the bonds are void, the city is bound, *ex acquo et bono,* to return the money it received for them. It therefore prays for a decree against the city for the amount of the money so received. There are two objections to this proposition: (1) If the city is liable for this money, an action at law is the appropriate remedy. The action for money had and received to the plaintiff's use, is the usual and adequate remedy in such cases. Where the claim is well founded, and the judgment at law would be the exact equivalent of what is prayed for in this bill, namely a decree for the amount against the city, to be paid within the time fixed by it for ulterior proceedings."

There was nothing to act on in the case at bar but the validity of the warrants issued under the contract, and that can be determined in an action at law.

State vs. City of Great Falls, 49 Pac. Rep., 15-22.

And the remedy by mandamus is ample to require the issuance of warants for anything to become due in the future.

Wood vs. Strother, 76 Cal., 545; 18 Pac. Rep., 766.

There is nothing in the allegation in complainant's bill (Trans. p. 6) that:

"It will become necessary to institute a multiplicity of suits upon the said agreement for the enforcement of payment of said semi-anual rentals."

Which is sufficient to give a court of chancery jurisdiction to hear and determine the case, unsupported by any proofs. Courts will presume that after a court of competent jurisdiction has adjudicated the matter in controversy, that the officers of the corporation will obey the mandates of the superior judicial tribunal.

Appellant has not exhausted its remedy at law.

It is shown by the bill and answer that for the year 1892 the total levy of taxes for all purposes was eight mills on the dollar, and for the year 1893, the total levy was six mills on the dollar (Trans. pp. 16 and 34).

Now, if the appellant's contract is valid it can proceed by mandamus and require additional levies up to the full limit of ten mills on the dollar; and thereby cause to be collected sufficient means to pay the full amount due it for water rents. This is a plain, speedy and adequate remedy provided by statute.

The charter of the City of Galveston contained a provision prohibiting the city from borrowing more than $50,000 for general purposes, and the city council entered into a contract for paving and grading the streets and sidewalks, and agreed to issue bonds of the city in payment therefor; and afterwards the city attempted to rescind the contract, and in a suit for damages by the contractors, in commenting on the power to contract, in the absence of any prohibitory provision in the charter, or general law or statute on the subject, as exists in the case at bar and did not exist in that case, and on the right to proceed by an action *for specific performance*, this court said, in *Hitchcock vs. Galveston*, 96 U. S., 341-353:

"There may be a difference between the case of an engagement made by a corporation to do an act expressly prohibited by its charter, or some other law, and a case of where legislative power to do the act has not been granted. Such a distinction is asserted in some decisions. But the present is not a case in which the issue of the bonds was prohibited by any statute. At most, the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at farthest, only *ultra vires;* and, in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract."

Gas Company vs. Leadville, 9 Colo., Ct. Appeals, 400.
Leadville Water Co. vs Leadville, 22 Colo., 297.

It is contended by appellant that the territorial supreme court erred in dismissing the bill unconditionally, because it might be held as a bar to further proceedings.

It is certified (Trans. p. 66):

"That said warrants issued to complainant, as set forth in complainant's bill, were and are null and void, having been issued by the defendant's trustees in excess of the amount derived from a two-mills levy on each dollar of taxable property, and having thus been issued contrary to law and in excess of the authority conferred by law upon said trustees."

This certification is incorrect. What the court did hold and decide is as follows, to wit:

"We conclude that ordinance No. 10, and the contract made thereunder are not void, but that the language of section 11 of said ordinance that the said town agrees to levy and collect a tax sufficient, etc., means and should be construed as an obligation for the town to exhaust its power, if necessary, to collect a tax sufficient, etc., within the limit of levying two mills upon the entire taxable property within its corporate boundaries. This provision of the law is to be read into the ordinance and the contract thereunder."

The only facts which were necessary for the court below to find and certify are as follows, to wit:

"The court doth further find and certify that no evidence was offered or introduced by either of said parties in said cause in said district court or in said supreme court, and that said cause, by stipulation of the parties, was heard and determined in and by the said district court upon the said bill of complaint of said Raton Water Works Company and the answer thereto of the Town of Raton, and that the facts hereinbefore stated and certified by this court are found solely upon and from said bill and answer and exhibits therewith filed, as the same truly appear in the transcript of the record in said cause, duly filed in the said supreme court, upon the appeal taken thereto by the Town of Raton from the final decree, findings of fact, judgment, and decision rendered and made by the said district court in favor of said Raton Water Works Company, decreeing the specific performance by the Town of Raton of said ordinance No. 10, contract and agreement aforesaid, and which said final decree, finding of fact, judgment and decision of said district court were and are in words and figures as follows, to wit:"

And this would have fully complied with the act of congress, approved April 7th, 1874, which reads:

"Section 2. That the appellate jurisdiction of the supreme court of the United States over the judgments and decrees of said territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said supreme court have prescribed or may hereafter prescribe:

Provided, That an appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the supreme court, together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said supreme court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal." Supplement to the Rev. Stats. of the U. S., Vol. I, p. 13.

All the facts that were before the district court and the supreme court are found in the record here in the pleadings and exhibits, and any certification as to the pleadings and record is mere surplusage.

With respect to the force which should be given to the certified statement of facts by the court below.

It has been seen that this cause was heard and determined all the way through on bill and answer, and no evidence of any kind was offered on either side, and there are and were no disputed facts, and the same rule with respect to facts should apply as if it had been determined on demurrer.

Hitchcock vs. Galveston, 96 U. S., 341, *supra*.

Now, let us see just what the court below did decide, as follows, to wit:

In favor of appellant:

First. "It (the contract ordinance No. 10) does not constitute an indebtedness for the whole amount *in presenti*. It is a continuing contract from year to year, and is binding on both parties so long as the conditions therein are not broken (Trans. p. 48—opinion).

Second. "The trustees of the defendant town had no au-

thority to enact and enforce ordinance No. 64, passed May 23d, 1895, so as to in any manner change or effect the appropriation then existing for that fiscal year as provided for by ordinance No. 59, enacted in March, 1895, for the fiscal years 1895 and 1896, and is therefore void to that extent.

Third. "Ordinance No. 59 seems to have been passed in accordance with this statute, and should not be permitted to be changed, so far as its appropriations are legal by ordinance No. 64.

Fourth. "The trustees of the defendant town had no authority to pass and enforce ordinance No. 65, by which it was attempted to make town warrants issued after June 1st, 1895, receivable in payment of town licenses." (Trans. p. 49—opinion); 49 Pac. Rep., 898.

Against appellant:

Fifth. "We conclude that ordinance No. 10 and the contract made thereunder are not void, but that the language of section 11 of said ordinance that the said town agrees to levy and collect a tax sufficient, etc., means and should be construed as an obligation for the town to exhaust its power if necessary, to collect a tax sufficient, etc., within the limit of levying two mills upon the entire taxable property within its corporate boundaries. This provision of the law is to be read into the ordinance and the contract thereunder."

Sixth. "As the town has heretofore, it is undisputed, more than complied with its obligation by paying an amount in excess of what could have been derived from a two-mills levy, and as ordinance No. 64 provides for the entire proceeds of a two-mills levy being paid to the complainant, it is apparent its bill is without equity and should be dismissed." (Trans. p. 50.—opinion.)

Thus it is seen that appellant has only two grounds for error in this appeal.

The decision of the said supreme court was the law in this case as to those ordinances, and binding on the appellee until reversed or modified, and it is not asking for reversal of that decision.

Appellant contends:

"If ordinance No. 10 and the warrants issued under it are void (certificate, p. 66) the town is entitled to have the bill dismissed absolutely; but on the other hand if the ordinance and warants are valid, the water company is entitled either to relief in equity, or at least to have the bill dismissed without prejudice to an action at law.

Third. "If, therefore, ordinance No. 10 and the warrants issued under it are valid, it was error to dismiss the bill absolutely, and the judgment must be reversed and the cause remanded, even though it should be held that the water company ought to have brought an action at law instead of a suit in equity."

Appellee contends that if the court should be of the opinion that the warrants issued under ordinance No. 10 and for the collection of which a decree is sought in the bill, are valid, and that the decree dismissing the bill generally for want of equitable jurisdiction, might be construed as a bar to an action at law, then this court should affirm the decree of dismissal, with costs, with the modification that the dismissal is without prejudice to the rights of the appellant or the legal holders of said warrants to bring an action at law.

AUTHORITIES.

"The decree dismissing the bill absolutely must be so modified as to declare that it is without prejudice to an action at law, and so modified, it is affirmed with costs." *Lacassagne vs. Chapius,* 144 U. S., 119; 12 Sup. Ct., Rep., 659.

And again:

"It follows from what has been said that this court is of the opinion that the bill in the present instance did not state a case within the present instance, did not state a case within the equitable jurisdiction of this court, and that it was properly dismissed for that reason. We observe, however, that the decree dismissing the bill is general, and does not preserve to the appellant her right to sue at law, if she so elect. The case is therefore remanded to the circuit court with directions to add to the existing decree a clause that the dismissal ordered is without prejudice to the complainant's right to sue at law; and as thus modified, the decree below is affirmed, at the costs of the appellant."

Sanders vs. Devereux, 60 Fed. Rep., 311-315.

6 Ency. Pl. and Pr., 895, and cases there cited.

REPUDIATION OF THE CONTRACT.

Appellant contends that appellee is attempting to repudiate the contract entered into under ordinance No. 10. This is untenable, because the trustees of appellee did not

have the original power to enter into the contract to pay any more than the proceeds of a two-mills levy, and it is not denied that appellee has paid that, and more, every year to appellant, for water rents. There can be no repudiation of a contract where the original power to make it is wanting.

United States vs. Macon County, 99 U. S., 582.

If the trustees had the authority to make the contract and bind the inhabitants of the town in the face of a plain statute to pay more for water rents per annum than the entire proceeds derived from a ten-mills levy on all taxable property in the corporate limits, then it must be conceded that there was no limit on their powers to contract and bind the town, except, possibly, as to unreasonableness of consideration.

AUTHORITIES CITED BY APPELLANT.

Appellant cites and relies on the decision of this court in *United States vs. County of Clark*, 96 U. S., 211.

Let us see upon what that decision was based:

"It is not averred, and it could not be, that the county court has not power to levy a county tax beyond that authorized in the charter referred to for the statutes of the state make it the duty of the court to levy taxes for county uses not exceeding the rate of five mills or one-half per cent. The tax of one-twentieth of one per cent. is an authorized addition to this."

The question is thus presented, whether the relator is entitled to payment of his judgment out of the general funds of the county, so far as the special tax of one-twentieth of one per cent. is insufficient to pay it. And we think, that he is thus entitled is plain enough, unless the act which gave the county authority to issue the bonds directs otherwise. That act gave plenary authority to the county to subscribe to the capital stock of the railroad company and to issue bonds therefor. We quote it at length:

" 'It shall be lawful for the corporate authorities of any city or town, or the county court of any county, desiring so to do, to subscribe to the capital stock of said company, and

levy a tax to pay the same not to exceed one-twentieth of one per cent. upon the assessed value of taxable property for each year.'

"It is to be noticed that the act imposed no limit upon the amount which it empowered a county to subscribe, and for the payment of which authority was given for the issue of county bonds. This was left to the discretion of the county court."

It is observed that this statute is very different from the New Mexico statute.

The court further says:

"There is no provision in the act that the proceeds of the special tax *alone* shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt."

Now we have seen (paragraph seventy-one, sec. 1622) that the special tax of two mills on the dollar each year shall be applied to the payment of water rents.

And again:

"Why, then, must not the special tax of one-twentieth of one per cent, be regarded as merely an additional provision made for the payment of the new debt, authorized, rather than as a denial to creditors of any resort to the ordinary sources from which payment of county debts is to be made? Why should such a provision be construed as placing the holders of the bonds in a worse situation than that of other creditors of the county?"

The difficulties of applying these principles to the case at bar, are: (1) That that suit was a mandamus to compel a general levy to pay a debt, and the case at bar is one in chancery for a specific performance; and, (2) because it has been seen that our statutes are full of limitations and restrictions, not shown to exist in the Missouri statute; and, (3) because by paragraph seventy-one, section 1622, it is specially provided that if the town had constructed its own water works, then "at the regular time of levying taxes in each year, said city or town is hereby empowered to levy and cause to be collected, in addition to the other taxes authorized to be levied, a special tax on the taxable property

in said city or town, which tax, with the water or gas rents hereby authorized, shall be sufficient to pay the expenses of running, repairing and operating such works."

And the limitation of said special tax is two mills on the dollar, and this is the limit to which the town could have gone, and no further.

Then why should this statute be so construed as to place the inhabitants of this town in a worse situation than if it had constructed its own works? Or why should the statute be construed more favorable to appellant than to the inhabitants of the town? The construction should be fair alike to both the town and appellant. Or why should the constituted authorities of the town be permitted to enter into a general contract with the appellant water company, or any one else, by which all the revenues, and even more, will be consumed for one special purpose, and leave no money with which to pay other creditors of appellee town? It is submitted that the case referred to is not controlling in the cause at bar.

Appellant also cites and relies on the decision in *Water Works Company vs. City of Creston,* 101 Iowa, 687, on a statute, so far as it appears in the opinion, similar, but not exactly, to the New Mexico statute, in which it is held that the limitation in the statute in that state is on the power to tax, but not on the power to contract; and that if the proceeds of the special tax is insufficient to pay the water rents agreed to be paid, then the deficiency may be paid out of the general revenues.

In the opinion, the court said:

One hundred and eleven. "Said ordinance provides for levying a special tax in accordance with section 8, chapter 78, acts of fourteenth general assembly, and that, if the tax so levied and collected be insufficient at any time to pay the water rentals, as provided, as the same are earned, then the city hereby agrees to annually or semi-annually set apart in money out of its general funds and annual revenues, a sufficient sum or sums to keep up said water fund so that said water rentals can be promptly paid when due."

Here it appears that the city authorities contracted to

levy, collect and pay the proceeds of a special tax in the manner and for the purpose provided by the statute, and when the special tax proved insufficient, "then the city hereby agrees to annually or semi-annually set apart in money out of its general funds and annual revenues, a sufficient sum or sums to keep up said water fund, so that said water rentals can be promptly paid when due."

This is a very different ordinance and contract from the one under consideration in the cause at bar, which is as follows, to wit:

"Section 11. That the said Town of Raton shall pay to the said Raton Water Works Company or its assigns, as follows, to wit: On the first day of January and July of each and every year one-half of the aforesaid money and for all additional hydrants thereafter in like manner on the 1st day of January and July as aforesaid. The said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent. per annum." (Trans. p. 21.)

Here, it will be observed, the contract was not made in contemplation of the payment of water rents ont of a special tax fund, but for a lump sum to be paid semi-annually, and with no intention or purpose or agreement to levy and collect a special tax as the law required, and an agreement to pay any possible deficiency out of the general revenues, as in the Creston case, *supra;* but only on condtion:

"That the said town agrees to levy and collect a tax sufficient for the purpose of making said semi-annual payments for each and every one of the twenty-five years aforesaid, and in default of making said payment the said town shall pay interest on said semi-annual payments at the rate of ten per cent per annum."

It is not disclosed by either the bill or answer, nor is it contended by appellant, that any special levy has ever been made as required by the statute to pay the water rents claimed to be due by appellant, and no special tax is called for in the contract, ordinance No. 10, but all payments have been made for water rents out of the general fund col-

lected out of the general levy for all purposes, which is limited (paragraph six, sec. 1622) to eight mills on the dollar.

The distinction drawn by the court in the Creston case, *supra,* that the limitation was on the power to levy the tax, and not on the power to contract, is but a distinction without a difference. If there was no power to provide means for the payment, it is difficult to understand where the authority rested to make the contract and obligate the town to pay water rents where it is admitted that one of the contracting parties, the town trustees, had no power to levy and collect a tax to meet its obligations agreed to be met.

This seems to be contrary to the principle announced by this court in *United States vs. Macon County,* 99 U. S., 582, where the court said:

"Thus, while the debt was authorized, the power of taxation was limited, by the act itself and the general statutes in force at the time, to the special tax designated in the act, and such other taxes applicable to the subject as then were or might be thereafter by general or special acts be permitted. No contract has been impaired by taking away a power which was in force when the bonds were issued."

And again, this court said, in *Nashville vs. Ray,* 86 U. S., 468:

"Their powers are prescribed by their charters, and those charters provide the menas for exercising the powers; and the creation of specific means excludes others. Indebtedness may be incurred to a limited extent in carrying out the objects of the incorporation. Evidences of such indebtedness may be given to the crdeitors. But they must look to and rely on the legitimate mode of raising the funds for its payment. That mode is taxation."

It is insisted by appellee that *Creston Water Works Co. vs. City of Creston, supra,* does not apply in this case.

Appellant insists that the appellee is attempting to impair the obligation of its contract in its passage and attempts to enforce ordinance No. 64 and No. 65, in violation of ordinance No. 59.

The only answer necessary to that contention is that the territorial supreme court sustained and found in favor of

appellant's contentions on all points made, except as to the power of the town trustees to enter into a contract to bind the town to pay more than the proceeds derived from a special two-mill levy (Trans. p. 49—opinion); and appellant cites in support of its contention:

New Orleans Water Works Co. vs. Rivers, 115 U. S., 674.

New Orleans Gas Co. vs. Louisiana Light Co., 115 U. S., 673.

Walla Walla vs. Walla Walla Water Works Co., 172 U. S., 1, and others.

But appellee insists that that question does not enter into the cause at bar, nor do the authorities cited apply here.

The territorial supreme court (Trans. p. 48—opinion) held that the contract ordinance No. 10 did not constitute an indebtedness, and the appellee is bound by that opinion until reversed or modified, and no cross-appeal has been asked or taken from that decision.

CONCLUSION.

First. The decision of the court below should be affirmed on its merits; but if this court should entertain a contrary opinion, then:

Second. The decree of the court below should be affirmed for want of equitable jurisdiction; but if this court should entertain the opinion that the absolute dismissal of the bill might be pleaded in bar to an action at law, then:

Third. The decree of the court below should be modified and affirmed without prejudice to an action at law, with costs.

Respectfully submitted,

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